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NO. 83-5912

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

DONALD EUGENE HARDING,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI

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STATEMENT OF THE CASE

As far as it goes, Harding's statement of the case is correct. However, he confines himself to merely reciting the fact that he was charged, convicted, and received various sentences, including two death penalties. The Court will want to be aware of the following facts proved by the state at trial: (1) When arrested in Flagstaff, Harding was driving the car loaned to one of the victims, Martin Concannon; (2) he had the second victim's (Robert Wise) credit cards and attache case; (3) he had the murder weapon in his pocket; (4) he left fourteen fingerprints on eight objects in the motel room where he hogtied, gagged, and shot both victims in the chest and head; (5) he had the phony "security guard" badge he used to dupe another motel guest in Waco, Texas, a month before he killed Wise and Concannon; the Waco robbery victim identified Harding as the man who used a "security guard" ruse to gain access to that victim's motel room; (6) Mrs. Wise, wife of one of the victims, identified Harding as the man who rang her doorbell in Mesa, several hours after killing her husband in Tucson, and asked if "Bob" was home; (7) Harding volunteered a statement to a Tucson detective to the effect that police might find blood on the shirt and shoes he had been wearing (they did); (8) while being transported from Flagstaff to Tucson in January 1980, Harding spontaneously told a detective that he deserved whatever happened to him. It is within the preceding factual context that the Court should consider whether Harding demonstrates any error of constitutional magnitude, and, if so, whether such alleged error was harmless beyond a reasonable doubt.

United States v. Hastings, ____ U.S. ____, 103 S.Ct. 1974, 1981, 76 L.Ed.2d 96 (1983).

A.

ALLEGED VIOLATION OF RIGHT TO
SELF-REPRESENTATION.

Indulging in a spurious analogy, Harding alleges that he was denied a fair trial because his advisory counsel, at the request of the trial court, prepared proposed jury instructions contrary to Harding's wishes. That, he asserts, contravened Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and mandates reversal of his convictions. Faretta was primarily concerned with the total denial of a defendant's right to represent himself, and did not attempt to flesh out in detail any concomitant problems that might arise when a court grants a defendant that right, but encounters specific problems attendant upon the exercise of the right during trial. While it may be true that the complete denial of self-representation may always be reversible error, Faretta surely does not stand for the proposition that, where one has had the opportunity to exercise that right, as in this case, any peripheral alleged infringement of the right must inevitably lead to reversal.

Harding's contention fails to consider two things: (1) context of the alleged violation; (2) applicability of the harmless error rule. In this case, Harding did exactly as he pleased during the entire trial with respect to how he wished to conduct the case. Advisory counsel did not open his mouth unless Harding wished him to do so. Near the end of trial, the trial court, in chambers, asked advisory counsel to prepare jury instructions. The trial court told Harding he could do with those as he wished. Harding tore them up, saying that he would have prepared his own if the court had not told advisory counsel to prepare them. The trial court gave him a day to do that, and he appeared the next morning with no instructions.

State v. Harding, ____ Ariz. ____, 670 P.2d 383, 396-97

1 (1983). He has never objected that any instruction was
2 constitutionally deficient, and the trial court in fact
3 used some of the proposed instructions submitted by
4 advisory counsel in Harding's behalf. In no manner did
5 advisory counsel, in the jury's presence, contradict
6 Harding's wishes or compete with him. That is why Wiggins
7 v. Estelle, 681 F.2d 266 (5th Cir. 1982), rehearing denied,
8 691 F.2d 213 (5th Cir. 1983), cert. granted, ____ U.S. ____, ____
9 S.Ct. ____, 75 L.Ed.2d 430 (1983), lends no support to
10 Harding's contentions. Harding maintains that any
11 tangential infringement of his right to self-representation
12 entitles him to a new trial without his showing prejudice.
13 He must take that position because he can show no
14 prejudice. Even the case upon which he relies, Wiggins,
15 supra, applied a harmless error rule in determining whether
16 alleged violations warranted reversal. 681 F.2d at 274.
17 Harding had the opportunity to submit proposed instructions
18 and did not do so; to argue that he had the power to
19 exclude his advisory counsel, acting as an officer of the
20 trial court at the court's request, from submitting
21 instructions, is inane. Respondent maintains there was no
22 violation of the right to self-representation, and, if
23 there was, it was harmless beyond any doubt in view of the
24 insuperable evidence in this case, and the uncontested
25 correctness of the trial court's instructions.

26 B.

27 PHOTOGRAPHS.

28 The Arizona Supreme Court correctly determined that
29 Harding, after an initial objection to some photographs
30 during a pretrial hearing, withdrew his objection to all
31 the photographs. State v. Harding, supra, at 396. That
32 factual determination by a state supreme court would be

entitled to a presumption of correctness in a federal
1 habeas proceeding. Sumner v. Mata, 449 U.S. 539, 101 S.Ct.
2 764, 66 L.Ed.2d 722 (1981); 28 U.S.C. § 2254(d). Yet,
3 Harding tells this Court that the Arizona Supreme Court
4 does not have the common sense to read the entire record,
5 which that court must do by statute to search for
6 fundamental error, and to determine whether in fact Harding
7 attempted to recant his withdrawal. Harding never renewed
8 his objection to the photographs; he now finds himself in
9 the ironic position, in this argument, of telling this
10 Court that his advisory counsel renewed the withdrawn
11 objection. Harding, however, never joined that attempted
12 renewal, and he adamantly insisted upon being referred to
13 both pretrial and at trial as the "attorney of record." It
14 simply does not do to tell this Court in the previous
15 argument that his advisory counsel violated his right to
16 self-representation by submitting, in-camera, proposed jury
17 instructions, then whirling about 180 degrees in this
18 argument to rely upon his advisory counsel to resurrect an
19 objection that Harding himself had withdrawn. Would not
20 that also have violated his right to self-representation
21 since he personally, as counsel of record, withdrew the
22 objection?

23 The Arizona Supreme Court did say that it felt some of
24 the pictures were more prejudicial than probative. But
25 Harding's personal withdrawal of objection to them did not
26 preserve the issue for appeal. To circumvent that, Harding
27 tries to convince this Court that the Arizona Supreme Court
28 did not recognize fundamental error. The Arizona Supreme
29 Court found no fundamental error. Harding's guilt was
30 overwhelmingly established by the evidence. Even
31 fundamental error may be harmless. Thus, even if one
32 wished to postulate, arguendo, that the photographs were

1 fundamental error under Arizona case law, the Arizona
2 Supreme Court obviously and implicitly found their
3 admission harmless beyond a reasonable doubt. That court
4 applies the same harmless error test this Court recently
5 enunciated in United States v. Harding, supra. State v.
6 Adamson, ___ Ariz. ___, 665 P.2d 972, 977-78 (1983).
7 Respondent emphasizes, however, that the Arizona Supreme
8 Court did not find the introduction of the photographs
9 fundamental error, and did find that Harding had withdrawn
10 objection to them. That was a state ruling on state
11 evidentiary law, and Harding shows no violation of
12 federally protected rights.

13 C.

14 SHACKLES

15 The Arizona Supreme Court fully explained why ankle
16 shackles were justified in this case, noting that Harding
17 had threatened his defense counsel (and any subsequent
18 replacement), and anyone connected with the trial, and had
19 engaged in assaultive behavior while in custody on these
20 charges. State v. Harding, 670 P.2d at 393-94; (Attachment).
21 These threats of violence to anyone connected with this
22 trial immediately distinguish this case from People v.
23 Burnett, 168 Cal.Rptr. 833, 111 Cal.App.3d 661 (1980).
24 Even California recognizes that contemporaneous threats
25 justify shackling. People v. Kimball, 5 Cal.2d 608, 55
26 P.2d 483 (1936). When one is the defendant, and threatens
27 harm to his advisory counsel and other officers of the
28 Court, there is no right not to have ankle shackles or to
29 be allowed total freedom of movement. Such a conclusion as
30 that advocated by Harding would lead to the absurd result
31 that trial courts must leave totally unfettered every
32 defendant who wishes to represent himself regardless of


threats he has made to those participating in the trial.
That has never been the law expounded by this Court,
California, or Arizona. The trial court minimized the
effect of the ankle shackles by seating Harding, before the
jury entered, at a desk with a closed front and sides.
Harding had no waist chains or handcuffs, only ankle
shackles. He could have stood behind the desk and
addressed the jury, but did not wish to do so. An
attorney's mobility before the jury has no necessarily
corresponding positive impact upon them -- indeed, it may
at times distract. If Harding had been completely
unrestrained, that would not have changed the evidence
against him in the slightest.

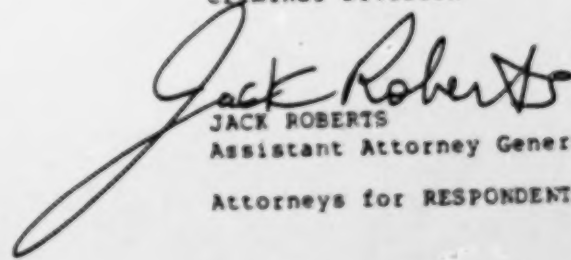
CONCLUSION

Harding presents no federal question to this Court.
His attempts to establish a violation of the right to
self-representation are strained. With respect to the
other points, he invites this Court to tell the Arizona
Supreme Court that it does not recognize fundamental error
when it sees it or know how to apply the test for harmless
error. None of this has merit, and the Court should deny
the writ.

Respectfully submitted,

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A F F I D A V I T

1 STATE OF ARIZONA)
) ss.
2 COUNTY OF MARICOPA)

3
4 JACK ROBERTS, being first duly sworn upon oath,
5 deposes and says:

6 That he served the attorney for the appellant in the
7 foregoing case by forwarding two (2) copies of RESPONSE TO
8 PETITION FOR A WRIT OF CERTIORARI, in a sealed envelope,
9 first class postage prepaid, and deposited same in the
10 United States mail, addressed to:

11 WILLIAM G. LANE
12 627 North Swan Road
Tucson, Arizona 85711

13 Attorney for PETITIONER
14 this 28th day of December, 1983.

15
16 
17 JACK ROBERTS

18 SUBSCRIBED AND SWORN to before me this 28th day of
19 December, 1983.

20 
21 NOTARY PUBLIC

22 My Commission Expires:

23 October 28, 1985

24 CR34-165
25 3306D clp
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1 THE COURT: Let' see, before me yet is the
2 matter of his representing himself.

3 MR. WILD: Right. Your Honor, I think we may
4 need to be more specific. Mr. Cooper has indicated to
5 Judge Druke, I don't know the specifics of what was said
6 and I don't whether Mr. Cooper wanted to make any
7 specific statement about what was said for the record,
8 it is simply my understanding that Donald Harding has
9 made a generalized threat to, as he said, all persons
10 involved in his case. I don't know that there is any-
11 thing more specific to that, any named individuals or
12 specific individuals other than all court personnel and
13 all people, and I take it that means anybody who is here.

14 My only request is that both deputies simply
15 be in the immediate presence of Donald Harding at all
16 times during the motions and trial.

17 THE COURT: Yeah. Was it in a very generalized
18 fashion in that matter, is that what he said?

19 MR. COOPER: Well, without revealing the
20 specifics, yes, Your Honor. }

21 THE COURT: It wasn't a threat directed at
22 any particular person?

23 MR. COOPER: Well, there were a couple. One
24 was a basic general threat, and the other -- yes, there
25 were specific threats. }

1 THE COURT: Okay.

2 MR. WILD: Your Honor, if I may as an aside,
3 on a civil matter there was -- there was a case out of
4 California where a psychiatrist had information that an
5 individual had threatened specific individuals and he
6 failed to communicate that either to the police or to
7 those threatened individuals. One of those individuals
8 did come to harm after that, I believe, and the individual
9 who failed to reveal was later held civilly liable
10 together with the university system in California to
11 reveal. I wouldn't want Mr. Cooper to be subjected
12 to that if he knew of a specific named individual and that
13 was not advised.

14 THE COURT: You wish to --

15 MR. COOPER: I would probably have to sue myself,
16 Your Honor. I think that would also go for, according to
17 Mr. Harding, any attorney involved in his defense.

18 THE COURT: Okay. And those -- those were the
19 specifics, you and anyone else who may take your place?

20 MR. COOPER: Essentially, Your Honor.

21 THE COURT: All right. Mr. Harding, are you
22 willing to waive in writing an attorney in this matter?

23 MR. HARDING: Yes, I am.

24 THE COURT: I am not persuaded yet that you
25 shouldn't have an advisory counsel. Are you still --

1 MR. COOPER: Judge, we are not
2 talking about the opening as Mr. Wild just said, we
3 are talking now at the closing.

4 MR. HARDING: Closing, Your
5 Honor.

6 THE COURT: I want the record
7 to show it, just in case it hasn't been fully made
8 yet, the reason the Court has ordered that the
9 defendant remain shackled, one, there was a report
10 in Court here at the commencement of this trial
11 of threats Mr. Harding has made upon anyone connected
12 with this trial, and particularly defense counsel;
13 and, two, the Court has heard of incidents at the
14 jail in which Mr. Harding was allegedly involved;
15 three, just the other day it was reported to the
16 Court that Mr. Harding had indicated to the Deputy
17 Sheriffs who were accompanying him back to the
18 holding area that he would never serve any time on
19 these offenses and that he would do something that
20 would necessitate his being killed by them before
21 he was to serve any time. Those are the reasons
22 which the Court has consistently denied Mr. Harding
23 the -- his request to be unshackled.

24 MR. HARDING: Your Honor, I
25 would like it on the record as denying making any